

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



CALIFORNIA STATE UNIVERSITY
EMPLOYEES UNION,

Charging Party,

v.

TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY,

Respondent.

Case No. LA-CE-787-H

PERB Decision No. 1886-H

February 20, 2007

Appearances: Brian Young, Labor Relations Representative, for California State University Employees Union; Marc D. Mootchnik, University Counsel, for Trustees of the California State University.

Before Duncan, Chairman; McKeag and Neuwald, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California State University Employees Union¹ (CSUEU) to an administrative law judge's (ALJ) proposed decision (attached). The ALJ's proposed decision dismissed an unfair practice charge which alleged that the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA)² by unilaterally repudiating a policy of granting release time to employees for the purpose of attending proceedings of the Board.

¹Subsequent to the filing of the charge, the charging party's name was changed from the California State Employees Association to the California State University Employees Union.

²HEERA is codified at Government Code section 3560, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

We have reviewed the entire record in this case including, but not limited to, the proposed decision, the hearing transcript, CSUEU's exceptions and CSU's response. The findings of fact in the ALJ's proposed decision are free from prejudicial error and we adopt them as the findings of fact of the Board itself.³ We also agree with and adopt the ALJ's conclusions of law, with the addition of the discussion below.

DISCUSSION

The focus of CSUEU's unfair practice charge was that CSU violated a past practice of granting release time to union representatives for purposes of attending proceedings of the Board. We agree with the ALJ's conclusions of law as it relates to this issue and adopt the finding that no binding past practice existed and therefore, the complaint that CSU violated HEERA by committing a unilateral change is dismissed.

In its exceptions to the ALJ's proposed decision, CSUEU contends, as an alternative argument, that the PERB informal conference on September 29, 2003, should have been treated as a meet and confer session, and therefore CSU was obligated to grant the release time under CBA section 5.1 la. Brian Young, CSUEU labor relations representative, testified that Section 5.11a of the CBA could be construed as requiring un-reimbursed release time. The ALJ did not find that argument persuasive and we agree.

CSUEU also asserts in its exceptions that the holding in Willits Unified School District (1991) PERB Decision No. 912 (Willits) should have been determinative in this case. The

³The ALJ's proposed decision includes an erroneous reference to correspondence from Lopez to CSUEU at pp. 11-12. The proposed decision states that "[w]hile [Samuel] Strafacci appeared to contend that released time for PERB proceedings was not authorized by any of the MOU provisions, the correspondence from Lopez to CSUEU allowed for such time to be requested and charged under sections 5.1 Id or 5.13." In fact, no such correspondence from Lopez is in the record. Rather, the exhibits submitted include a November 3, 2003, letter from Holly Perez to CSUEU referencing release time under Sections 5.11dor5.13 of the parties' collective bargaining agreement (CBA). This apparent error in name is not prejudicial and does not impact the remaining findings of fact.

ALJ's proposed decision did not discuss Willits. In Willits the Board determined that the district violated the Educational Employment Relations Act (EERA)⁴ when it failed to grant paid release time to a union representative to attend a PERB settlement conference concerning an unfair practice charge. Willits is distinguishable. In Willits, PERB determined that the school district should have granted the release time to attend a PERB informal conference because under the facts in that case, the informal conference was a meet and confer session. In Willits, PERB found that "both sides knew, or should have known, of the clear possibility that the settlement conference would turn into a negotiating session" because the dispute involved a key issue in the parties' ongoing negotiations. (Willits, adopting ALJ's proposed dec. at p. 19.) Furthermore, in Willits the collective bargaining agreement did not include provisions for release time for negotiations, so the Board relied on the "abundant evidence" that "the [d]istrict never previously declined release time on the frequent occasions when negotiations or mediation occurred during working hours." (Willits, adopting ALJ's proposed dec. at p. 20.) Willits did *not* hold that all PERB informal conferences will be deemed meet and confer sessions.

The facts in this case do not support a finding that the PERB informal conference in September 2003 and continued to November 2003 should have been deemed a meet and confer session and therefore paid release time granted under section 5.11a of the CBA. The record does not indicate that the informal conference was an extension of the parties' negotiations, as was the case in Willits. The record contains no evidence that the parties were engaged in ongoing negotiations as they were in Willits. Additionally, it should be noted that any dispute

⁴EERA is codified at Section 3540, et seq.

between the parties as to CSU's failure to allow the release time under the CBA would be subject to deferral to the CBA's grievance/arbitration process. (PERB Reg. 32620(b).⁵)

ORDER

The unfair practice charge in Case No. LA-CE-787-H is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members McKeag and Neuwald joined in this Decision.

⁵PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

**STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD**



CALIFORNIA STATE UNIVERSITY
EMPLOYEES UNION,

Charging Party,

v.

TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY,

Respondent.

UNFAIR PRACTICE
CASE NO. LA-CE-787-H

PROPOSED DECISION
(3/1/06)

Appearances: Brian Young, Labor Relations Representative, for California State University Employees Union; Marc D. Mootchnik, University Counsel, for Trustees of the California State University.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

California State University Employees Union (CSUEU)¹ initiated this action under the Higher Education Employer-Employee Relations Act (HEERA)² by filing an unfair practice charge against the Trustees of the California State University (University) on November 13, 2003. The charge alleged that the University unilaterally repudiated its policy of granting released time to employees for the purpose of attending proceedings of the Public Employment Relations Board (PERB or Board).

On May 26, 2004, the Office of the General Counsel of the PERB issued a complaint alleging that the University unilaterally changed its policy of granting released time for the

¹ Subsequent to the filing of the charge, the union's name was changed from California State Employees Association to California State University Employees Union. The case caption has been amended accordingly.

² The HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

purpose of attending PERB informal settlement conferences. This conduct is alleged to violate section 3571(a) and (c)³ of the Act.

On June 18, 2004, the University answered the complaint, denying the material allegations of the complaint and raising a number of affirmative defenses.

An informal settlement conference was held on July 30, 2004, but the matter was not resolved.

On January 23, 2006, a formal hearing was held in Los Angeles before the undersigned. The parties presented oral argument at the end of the hearing. With the receipt of hearing transcripts on February 23, 2006, the matter was submitted for decision.

FINDINGS OF FACT

CSUEU and the University are parties to a memorandum of understanding (MOU) covering the period from July 1, 2002, through June 30, 2006. There are four systemwide bargaining units covered by this agreement: Unit 2 (Health Care Support), Unit 5 (Operations Support Services), Unit 7 (Clerical/Administrative Support Services), and Unit 9 (Technical Support Services).

The MOU contains provisions relating to released time. Section 5.1 la provides:

³ Section 3571 provides that it shall be unlawful for the higher education employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

.....

(c) Refuse or fail to engage in meeting and conferring with an exclusive representative.

The CSU shall provide release time for up to ten (10) people employed by the CSU for each scheduled meet and confer session. Normally, the Union shall provide the Office of the Chancellor with the names of the employees for whom release time is being requested at least five (5) working days prior to the commencement of the meet and confer session(s). Additional release time shall be provided on an individual basis to meet special needs related to transportation and work schedules. Upon the Union's request such additional release time may include granting no more than one (1) additional day prior to the scheduled meet and confer session for an employee whose workday ends between midnight and 6:00 a.m. The parties may mutually agree to provide release time for bargaining unit member to caucus upon request by CSEA. Upon request an employee on the bargaining team on swing or graveyard shift shall be reassigned to the day shift for the duration of the bargaining.

Section 5.11d provides:

The CSEA and the CSU agree that effective July 1, 2002, an annual allotment of five hundred seventy-six (576) days will be available, as requested by CSEA Headquarters, provided that all the requirements of Provision 5.6^[4] are met. The allotment of five hundred seventy-six (576) days will be used on a fiscal year basis from July 1, through June 30 of each year of the Agreement. Two hundred eighty-eight (288) days shall be allocated for union representatives to conduct union business at the campus on which they are employed, provided that all the requirements of Provision 5.6 are met. Such requests shall specify whether the leave is either on or off campus leave. Any days that both parties agree are unused at the end of the fiscal year become available for use of CSEA in accordance with the requirements of this provision. Two hundred eight-eight (288) days shall be allocated for union representatives to conduct union business at any location. Requests for release time under this provision shall be submitted in writing by CSEA Headquarters to the CSU Headquarters. The request shall be submitted to CSU Headquarters at least five (5) days in advance of the requested time off. Any request not received five (5) days in advance shall be deemed denied. The campus shall grant such requests, provided operational needs are met. The CSEA Headquarters shall submit to the CSU thirty (30) days in advance of the first date of leave requested the names of the Union Representatives at each campus who shall be eligible for such leave. CSEA shall

⁴ Section 5.6 requires that union activity generally occur on non-work time and in a manner that does not otherwise interfere with University operations.

provide to the CSU a quarterly report of leave used under this provision.

Section 5.13 provides:

Upon written request of normally not less than five (5) working days from the Union to the Office of the Chancellor, the CSU shall grant a union leave without loss of compensation to any Union Representative.

- a. Such leave may be partial or full-time and shall not be less than one (1) day for exempt employees and shall be on an hour for hour basis for non-exempt employees. No leave may be more than one (1) year in duration. An employee on such a leave shall continue to earn service credit and retirement credit. An employee on such a leave shall have the right to return to his/her former position upon expiration of the leave. Such a leave shall not constitute a break in the employee's continuous service for the purpose of salary adjustments, sick leave, vacation or seniority.
- b. The CSU shall be reimbursed by the Union for all compensation paid the employee on account of such leave and for any incidental costs. Reimbursement by the Union shall be made no later than thirty (30) days after its receipt of the CSU certification of payment of compensation to the employee.
- c. Such a union leave in accordance with this Article shall also be provided to a bargaining unit employee upon becoming CSEA Statewide President.

There is no reference in the MOU to released time in connection with PERB informal settlement conferences. Only one other University MOU references released time in a manner that could be construed as applying to such conferences specifically. That contract is for the unit represented by the State Employees Trades Council, and the wording references "administrative hearings."

Brian Young is a labor relations representative employed by CSUEU. He is responsible for formal representation of employees in arbitrations, civil service appeals, and PERB matters. Young's jurisdiction includes the San Diego and San Marcos campuses. In his 24 years of

service, Young has represented employees at all of the southern California campuses with the exception of Channel Islands.

Young relies on the campus CSUEU representatives to assist him in presenting unfair practice charges. Young recalled there being 14 unfair practice charges during his period of covering San Marcos. Twelve of them arose while Melody Kessler was the campus director of human resources and equal employment opportunity between 2000 and 2004. This was an unusually high number of cases for that period of time, and Young attributed this to a contentious relationship between CSUEU and the administration, principally Kessler. Approximately one-half of these charges resulted in informal conferences. Young submitted released time requests to the campus human resources office on behalf of the employees. The human resources office then arranged for released time by contacting the employee's department and arranging for coverage of the employee's duties. The time was never "charged" under the chargeable provisions of the MOU (i.e., sections 5.11d or 5.13).

Alan Miles is employed by the University as an information technology consultant. He also serves as a chief steward for CSUEU at the San Marcos campus. Miles' role is to serve as a coordinator of contract enforcement for the represented units, including grievances and other litigation matters, such as PERB unfair practice charges. Miles testified that he attended several informal conferences at the Los Angeles office of the PERB on released time. Typically he was copied on e-mail correspondence between Young and the University for verification of the University's authorization for his released time. Miles recalled informal conferences being scheduled approximately three to four times annually during the three-year period when Kessler was the campus human resources director.

Miles was scheduled to attend an informal conference in Los Angeles on

September 29, 2003. The subject matter involved contracting-out of campus student housing services. However, when Young submitted a released time request on this occasion, it was denied. Miles testified that it was the first such occasion. Young protested on Miles' behalf. As a result of the intervention of Marc Hurwitz, a PERB agent, the University agreed on a "one-time," "non-precedential basis" to allow Miles to attend on released time. Subsequently, the University ceased granting Miles released time to attend PERB informal conferences. On one such occasion, Miles attended an informal conference and used vacation time to prepare and attend.

JanetLynn Mosemak is employed by the University as a library assistant. She is a CSUEU representative for Unit 7. Mosemak has participated in informal conferences. She attended the September 29, 2003, conference, her very first, along with Miles. Mosemak testified that she and Miles were granted released time, and agreed that it was purportedly on a one-time basis. Mosemak believed that her relationship with her supervisor suffered after this event. Mosemak claimed that Cindy Halsted, another CSUEU representative who attended the conference, ceased further representation activities after the September 29, 2003, informal conference for similar reasons.

Ellen Cardoso is the associate director of human resources and equal employment opportunity for the San Marcos campus. Cardoso has attended PERB informal conferences on behalf of the campus. Cardoso testified that she was contacted by Hurwitz regarding released time for the September 29, 2003, conference. She acknowledged that Young typically submitted released time requests to the campus director of human resources, though generally she did not inspect them. In this particular case, she learned that her superior, Holley Perez, Kessler's successor, failed to respond to Young's released time request, and Young

contacted her to follow up. Cardoso testified that the one-time agreement allowed Mosemak and Halsted, not Miles, to attend on released time. Cardoso attended the conference and her contemporaneous notes of the conference corroborate the University's claim that Mosemak and Halsted attended but Miles did not. I credit the University's account that Miles did not attend the September 29 conference. E-mail correspondence between Hurwitz and Cardoso also reflect released time authorization for Mosemak and Halsted only. Cardoso testified that subsequent to the September 2003 conference, the campus has been "charging" CSUEU for released time used for PERB informal conferences.

Cardoso testified that other unions have attended informal conferences without an employee representative. In addition, the appropriate administrators on the University's side are typically directed to remain on campus and be available by telephone to discuss and approve settlement proposals entertained during the informal conferences.

Young testified that in the housing services case he made a request to the human resources director at the time, Perez, to allow released time for six employees, including the chief steward, the chapter president, and a representative from each of the four bargaining units (since the case impacted all units).⁵ Perez questioned why six representatives were needed. She also challenged Young to cite a provision of the MOU granting released time for PERB informal conferences. Young responded that the right emanated from the provisions of the HEERA. Though Young agreed to reduce the request to cover four employees, Perez denied the request for University-paid released time and instructed Young to charge the time to the union released time bank under sections 5.11 or 5.13. Young refused, asserting that the University was changing a past practice. Young, who was involved in systemwide bargaining

⁵ It is unclear how Perez held Kessler's position at this time if Kessler did not leave until 2004. However, the discrepancy is immaterial to the issues in the case.

over the relevant time period of the disputed contract language, claimed that 5.1 la, or "unreimbursed," meet-and-confer time, could be construed as covering informal conferences under the notion that such activities constituted an extension of collective bargaining.

E-mail correspondence between Young and Perez indicates that Perez assumed Young's request was going through the Chancellor's office and that the request was pursuant to section 5.13. Young responded that, "[n]ormally the release is handled by the campus," and "[w]e've had quite a bit of practice on this at [the San Marcos campus]." Later Perez stated to Young that she had confirmed with the Chancellor's office that requests were to be submitted through that office, not through the campus.

In correspondence between Young and University Counsel Marc Mootchnik subsequent to the September 29 informal conference, Mootchnik stated that "[r]eleased time requests are typically handled by the campuses or by the Chancellor's Office depending on which provision of the contract they are made under." On the same date as this e-mail, Perez wrote to Young stating that released time could be granted for PERB informal conferences under the provisions of section 5.11d or 5.13.

Kessler testified that during her tenure there was no practice of allowing released time to any of the unions for PERB informal conferences. Kessler tried to review CSUEU's released time requests submitted to her office, but she did not review all of them, and not always at the time they were processed. On one occasion in November 2002, Kessler failed to respond to a request for released time. Miles and the employee in the dispute attended the informal conference, presumably on released time, but Kessler chose not to challenge the matter or demand reimbursement because she believed it would have hindered settlement of the charge. In an earlier case, in August 2002, Kessler granted a request on behalf of Miles

and the employee participant for a formal hearing because she was trying to "enhance" the parties' relationship. She contended that it was a one-time event, not intended to establish a new practice. Nonetheless, Kessler conceded that the University had never charged CSUEU for released time under the reimbursement provisions of the MOU.

Samuel Strafaci, the assistant vice chancellor for human resources, has supervised systemwide bargaining for the represented units since 1992. Strafaci testified that section 5.11a time is intended to cover statewide bargaining activities, and that it has occasionally been applied to local campus bargaining as well. Section 5.11d time is time CSUEU has "purchased" for union business, but is meant only for on-campus activities. Section 5.13 time is reimbursed time for activities by union officers on an ad hoc basis, and typically for periods of longer duration than just a single day. Specifically as to sections 5.11a and 5.11d, Strafaci contended that neither of these provisions was intended to cover attendance at PERB informal conferences. He also claimed that section 5.13 time was for "internal union business," which, like section 5.11d, would not include PERB informal conferences. Strafaci acknowledged a document from his office to the San Marcos campus granting released time for (unspecified) "union business." However, he claimed it would have been a mistake if the declared purpose had been for a PERB informal conference.

CSUEU presented an e-mail from Young to employees from December 1999 in which Young advises employees he will submit a released time request to the campus on their behalf. Also presented was a 1999 letter request to the human resources director at the Dominguez Hills campus, a February 2002 e-mail request and affirmative response at the San Diego campus, and the August and October 2002 e-mail requests to Kessler noted above.

ISSUE

Did the University unilaterally change a past practice whereby employees attending PERB hearings could do so on "uncharged" released time?

CONCLUSIONS OF LAW

CSUEU contends that the University has unilaterally repudiated a policy on use of released time for PERB proceedings. To prevail on a complaint of unilateral change, the charging party must establish by a preponderance of the evidence that (1) the employer implemented a change in policy; (2) the action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the action is not merely an isolated incident, but amounts to a change of policy (i.e., having a generalized effect or continuing impact on terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

It is not disputed that the alleged cessation of released time as to PERB proceedings was implemented without formal notice and without an opportunity for bargaining having been afforded CSUEU. The University's witnesses and the parties' correspondence made it clear that if there was a prior practice of allowing uncharged released time for attendance at PERB proceedings the University no longer honored that policy after September 2003. Thus, the alleged change meets the requirement that it have a generalized effect and continuing impact on terms and conditions of employment. (See, e.g., Regents of the University of California (1990) PERB Decision No. 826-H [campus-wide change in terms of statewide collective bargaining agreement found unlawful].) Further, released time is a negotiable matter under the

HEERA. (Sec. 3569.)

The University defends its action on the ground that evidence is lacking to show there ever was a policy, or status quo practice, allowing released time for PERB proceedings that existed in addition to the "charged" released time permitted under the MOU.

For a past practice to be binding, it must be (1) unequivocal, (2) clearly enunciated and acted upon, and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. (*Riverside Sheriffs' Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291 [131 Cal.Rptr.2d 454] (County of Riverside).) PERB has also described an enforceable past practice as one that is "regular and consistent" or "historic and accepted." (Hacienda La Puente Unified School District (1997) PERB Decision No. 1186, adopting proposed decision of administrative law judge at p. 13.)

As to the question of unequivocality, a starting point is the negotiated language regarding released time. The HEERA and Ralph C. Dills Act differ from the other statutes administered by PERB in regard to their provision for released time. For these statutes, the statutory guarantee of released time is suspended when an MOU providing for such is in effect. (Compare sec. 3518.5, 3568, with secs. 3505.3 and 3543.1, subd, (c); but see San Mateo County Community College District (1993) PERB Decision No. 1030.) The HEERA states that "[w]hen a memorandum of understanding is in effect, released or reassigned time shall be in accordance with the memorandum [of understanding]." (Sec. 3569.)⁶ While *Strafaci*

⁶ Section 3569 provides:

A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released or reassigned time without loss of compensation when engaged in meeting and conferring and for the processing of grievances prior to the adoption of the initial memorandum of understanding. When a memorandum of understanding is in

appeared to contend that released time for PERB proceedings was not authorized by any of the MOU provisions, the correspondence from Lopez to CSUEU allowed for such time to be requested and charged under sections 5.11d or 5.13.⁷

Young did claim that 5.11a time should be construed as authorizing "unreimbursed" released time for PERB informal conferences. But I do not find this argument persuasive. PERB informal conferences involve issues, such as interference, retaliation, and other matters, that do not necessarily implicate contract interpretation. Thus, these issues do not constitute the process of "continued bargaining." Moreover, if such an expansive interpretation were intended I believe the parties would have indicated so in the language employed. Young offered no bargaining history or other evidence to support this interpretation, and the language of section 5.11a is quite explicit in limiting the time to meet-and-confer sessions.

CSUEU maintains that it was never required to charge this released time against the bank of hours set by the MOU and, it appears to contend, never required to follow the contract's procedure of submitting requests through the Chancellor's office. CSUEU cites no other provision of the MOU which can be construed as independently allowing for unreimbursed released time for PERB proceedings.

effect, released or reassigned time shall be in accordance with the memorandum.

Effectively, the MOU defines what constitutes "reasonable" released time. Prior thereto, the union may resist bargaining proposals that effectively abridge the statutory guarantee. (San Mateo County Community College District, supra, PERB Decision No. 1030.)

⁷ Strafaci claimed that section 5.11d did not authorize chargeable time because PERB proceedings are not held on campus. However, he appears not to have recognized that 288 days, or one-half of the 576 total annual allotment, are allocated for use at "any location." And, as to the other 288 days for "business at the campus," the request must specify "whether the leave is either on or off campus leave."

The MOU does reflect a practice at odds with CSUEU's claim of released time outside the four corners of the MOU. Thus, the MOU does raise doubts that the University would grant some benefit it was not obligated to provide under the contract. There is no evidence that the University took the initiative in granting the "gratuitous" released time for PERB proceedings (i.e., the requests were always initiated by CSUEU), or that it ever formally announced a policy of such. Nor is there any evidence of a communication between the parties where the policy was expressly acknowledged by the University. This context strongly suggests that Young's ability to obtain released time for PERB informal conferences by going directly to the campus human resource offices at the San Marcos, Dominguez Hills and San Diego campuses was something of an aberration, or possibly even a mistake on the University's part. It also seems reasonably clear that if Young had submitted his requests to the Chancellor's office, at least to Strafaci himself, and had identified his specific purpose, those requests would have been denied.

The local campus practices, such as the record reflects, do not override these complications so as to establish that the practice was unequivocal on the part of the University. For example, Kessler believed she was granting uncharged released time not because she was obligated to do so, was following a practice established before her, or because she was intending to establish a new policy. In addition, when the dispute arose as a result of the September 29, 2003, request, Perez communicated to Young that she assumed Young's request had first gone through the Chancellor's office. She later communicated to Young that she had confirmed this was the correct procedure. The campuses might have assumed then that a written request had been made simultaneously to the Chancellor's office, had been approved by that office as charged time under the MOU, and that the local campus request by CSUEU

was simply to address the "operational necessity" aspects of the approval, as is contemplated by the language of section 5.11d.⁸ Since charged time was accounted for on a systemwide basis, it would have been logical for the Chancellor's office to be responsible for that accounting.

The second showing of a "clearly enunciated and acted upon" policy is perhaps question-begging: enunciated and acted upon by whom?; by the party against whom the policy is sought to be enforced, or by both parties? However, as noted above, there is no evidence of a policy "clearly enunciated" by the University, or an attempt by CSUEU, prior to the September 2003 dispute, to have the University formally acknowledge such a policy. For the reasons noted above, there is little evidence that the San Marcos human resources office "acted upon" a policy of granting the released time that was not to be charged to the MOU. Admittedly, the lax implementation of the MOU procedures, and the University's lack of clarity as to the proper application of those procedures, do not speak well for its contract administration and inter-campus coordination. Nevertheless, I find it more plausible that this was the product of genuine confusion rather than a posture manufactured for purposes of litigating this case. CSUEU can point to no evidence where it put the local campuses on notice that it expected the released time for PERB informal conferences not to be charged time.

The third factor of "readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties" adds the "reasonable period of time" component. The evidence submitted by CSUEU shows the earliest request dating back to 1999 at Dominguez Hills. There was one additional documented affirmative response from San Diego

⁸ Mootchnik seemed to add to the University's equivocation when he communicated to Young that released time requests were handled by either the Chancellor's office or the campus, "depending on which provision of the contract they are made under."

in 2002, and two from San Marcos in 2002. There were a total of seven informal conferences, at least the bulk of which it appears did not lead to released time disputes. This is not an overwhelming number of instances and, for the reasons explained above, they do not demonstrate a clear and conscious recognition on the University's part that the time was not being granted under the authority of the MOU.

A mistaken, or at least unintentional, beneficial practice does not prevent the employer from subsequently reverting to strict enforcement of the applicable terms of the parties' collective agreement. (Marysville Joint Union High School District (1983) PERB Decision No. 314.) I believe that, rather than a reversal of a policy consciously maintained, is what occurred in this case.

Under the County of Riverside test, I find that CSUEU has failed to demonstrate by a preponderance of the evidence that the University had a binding past practice of granting released time for PERB informal conferences not contemplated within the MOU. Since this element of the unilateral change test is lacking, I find there is no violation of section 3571(c), and hence also no violation under section 3571 (a).⁹ Accordingly, the complaint and underlying unfair practice charge must be dismissed.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this

⁹ CSUEU did argue in its opening statement that the cessation of the practice had the effect of interfering with its right to assist employees in representation by restricting its ability to choose representatives that were necessary in the case. There is insufficient evidence in this record that personal attendance by multiple representatives was necessary or that employees had actually been denied the right to attend based on usage of section 5.11d time. (See Regents of the University of California (1983) PERB Decision No. 308-H.) The University also asserts a deferral-to-arbitration defense, an issue which I find unnecessary to decide.

case, the complaint and underlying unfair practice charge in Case No. LA-CE-787-H, California State University Employees Union v. Trustees of the California State University, are hereby DISMISSED.

Pursuant to PERB Regulation 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the PERB itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174

FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (PERB Reg. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (PERB Regs. 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (PERB Reg. 32135(b), (c) and (d); see also PERB Regs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served

on a party or filed with the Board itself. (See PERB Regs. 32300, 32305, 32140, and 32135(c).)

Donn Ginoza
Administrative Law Judge